

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

OP.No. 1203 of 1997(R)

PETITIONER:

SHRI K. ARAVINDAKSHAN, 'KRISHNA MANSION',
ARANDAPALLAM, THEKKEDESOM, NALLEPPILLY, CHITTOOR, PALAKKAD.

BY ADV. SRI.T.M.CHANDRAN

RESPONDENTS:

1. THE INDUSTRIAL TRIBUNAL, PALAKKAD.
2. M/S. INSTRUMENTATION LIMITED, KANJIKODE WEST,
PALAKKAD REPRESENTED BY ITS GENERAL MANAGER.

BY ADV. SRI.U.K.RAMAKRISHNAN
SRI.P.V.LOHITHAKSHAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD
ON 28/6/2007, THE COURT ON 4.7.2007, DELIVERED THE
FOLLOWING:

APPENDIX

EXT.P1-TRUE COPY OF THE JUDGMENT DATED 30.1.1986 IN CC NO.1/85

EXT.P2-TRUE COPY OF ORDER DATED 7.5.1996 PASSED IN MP NO.1/94

// TRUE COPY //

P.S. TO JUDGE

T.R. Ramachandran Nair, J.

O.P.NO. 1203 of 1997-R

Dated this the 4th day of July, 2007

JUDGMENT

This original petition is filed by the petitioner seeking to quash Ext.P2 order passed by the Industrial Tribunal, Palakkad in M.P. No.1/1994. The petitioner herein was dismissed from service of the second respondent herein with effect from 16.2.1984. This was after conducting a domestic enquiry. In M.P. No.50/1987 in I.D. No.93/1986, filed initially before the Industrial Tribunal, Kozhikode, the management sought for approval of the dismissal. This was transferred to the Industrial Tribunal, Palakkad and by the impugned order, the Industrial Tribunal allowed the application granting approval for the dismissal of the petitioner herein.

2. The facts lie in a narrow compass. The petitioner was working as a Store Keeper in the Materials Department of the second respondent from June 1979 till June 1983. The allegation against him is that he had misappropriated an amount of Rs.19,819.35 by forging and tampering the delivery receipts, by inflating the amount and the weight in delivery receipts from 1.4.1980 to 17.5.1983. Even though three criminal cases have been charge-sheeted as C.C. Nos.1/1985, 5/1986 and 6/1986 before the

Special Judge, C.B.I., Ernakulam, he was acquitted by the Special Judge. Later on, domestic enquiry proceedings were initiated against him which ended in his dismissal.

3. The validity of the domestic enquiry was challenged by the petitioner and by order dated 27/2/1991 the Tribunal found that the domestic enquiry was conducted improperly. Consequently, the management was allowed to prove its case by adducing fresh evidence. The management produced Exts.R1 to R13 and examined Mws.2 to Mws.4 to prove the charges. The petitioner was examined as WW.1 and he produced documents Exts.W1 to W15.

4. The main contention urged by the learned counsel for the petitioner are that in view of the acquittal of the petitioner on the same set of facts and allegations, the order Ext.P2 passed by the Tribunal upholding the dismissal will not stand in the eye of law. Reliance was placed on the principles stated by the Apex Court in **G.M. Tank v. State of Gujarat and others** ((2006) 5 SCC 446). It was further argued that it is a case of no evidence and the Tribunal acted perversely in finding the guilt on the petitioner. Relying upon the pleadings as well as the findings of the criminal court, it was pointed out that even though the allegation is one of misappropriation of money, it has not been conclusively proved that the petitioner was entrusted with the money and was in charge of the same. Therefore, it is contended that none of the allegations could stand in the eye

of law. It was also pointed out that the evidence of witnesses was unacceptable as no oral evidence regarding the said aspect can be believed in the absence of any proof regarding the authority of the petitioner to handle the money.

5. The second respondent has filed a counter affidavit and the petitioner has filed a reply affidavit also. In the counter affidavit, the second respondent has averred that the acquittal in a criminal case has no impact on the domestic enquiry proceedings as well as the proceedings before the Industrial Tribunal. It is pointed out that the memo of charges dated 16.2.1984 was issued in respect of 199 instances of misappropriation and only 19 instances were considered by the criminal court in the three cases. Therefore, it is contended that the judgments of the criminal court will not be a bar in initiating the disciplinary action. It is also pointed out that the criminal court acquitted the accused by giving him the benefit of doubt and it is not an honourable acquittal. The second respondent further contends that the onus of proof required in a departmental enquiry and in a criminal case before a criminal court are entirely different. On the merits also, the second respondent has traversed the allegations in the original petition.

6. Shri T.M. Chandran, learned counsel for the petitioner invited my attention to the findings of the criminal court in Ext.P1 judgment. According to the learned counsel, even though in the operative portion of

the judgment the criminal court acquitted the accused by giving the benefit of doubt, the findings in the body of the judgment will show that it is an honourable acquittal. It is also pointed out that the petitioner was victimised in that even though originally in the F.I.R. there were three accused persons and charge was laid only against the petitioner deliberately and maliciously. This was actually being done by the prosecution as a device to shield the actual culprits as found by the criminal court also. Therefore, it is pointed out that the disciplinary action is a clear case of victimisation.

7. A reading of Ext.P1 judgment shows that the offence charged is under Sections 409, 468 and 471 I.P.C. read with Sections 5(1)(c) and 5(2) of the Prevention of Corruption Act. The prosecution case was that the accused being entrusted with the imprest amount for taking delivery of consignments for the period from 21.6.1980 to 5.9.1980, committed breach of trust of an amount of Rs.510/- from the said imprest amount by forging/making material alterations in respect of the amounts in two bills of M/s. Kerala Transport Company and four bills of M/s. Kalpaka Transport Company. In respect of the entrustment of the amount, in Ext.P1 judgment the finding was that the “prosecution has failed to adduce any convincing evidence to prove that imprest money was actually entrusted with the accused as Store Keeper” and that “the entire liability cannot be attributed to the accused who was acting only as a Probationary Store Keeper during

the relevant period.” With regard to the forgery and material alterations of the receipts Exts.P3 to P8 and the imprest money statements, Exts.P9 and P10, the finding by the criminal court was that “it cannot be concluded that it was accused who made those material alterations.” Ultimately, in paragraph 15, the learned Special Judge found that “the prosecution has failed to adduce any convincing evidence to prove that the Imprest money alleged to have been misappropriated was actually entrusted with the custody or control of the accused and he cannot be found guilty of the offences punishable under Section 409 I.P.C. and Section 5(2) read with 5 (1)(c) of the P.C. Act. Since the prosecution also failed to adduce any convincing or reliable evidence to attribute the offence of forgery for the purpose of cheating and the offence of using forged documents as genuine against the accused beyond any reasonable doubt, the accused cannot be found guilty of the offence punishable under Sections 468 and 471 I.P.C.

In the light of what I have stated above, with all the above infirmities of the prosecution coupled with lack of convincing or reliable evidence to attribute the guilt against the accused by giving the benefit of doubt the accused is entitled to be exonerated from the liability.” Therefore, it is not a case where there was honourable acquittal on the merits of the offences charged and the benefit of doubt was given to the accused. The findings rendered by the criminal court referred to by the learned counsel for the petitioner also will not indicate that there was an honourable acquittal of the accused.

When the criminal court has acquitted the accused by giving the benefit of doubt as far as the judgment is concerned, no other interpretation need be invited to hold it as an honourable acquittal. Therefore, the said argument of the learned counsel for the petitioner cannot be accepted. Simply on the basis of the acquittal, disciplinary proceedings will not stand invalidated. As pointed out by the learned counsel for the second respondent, the criminal cases were in respect of only 19 instances and the disciplinary enquiry was in respect of 199 instances. This aspect is not disputed by the petitioner. Therefore, it is not a case where the disciplinary proceedings have been initiated based on the same set of facts, charges and evidence and witnesses of the criminal proceedings. In 2006 (5) SCC 446, the departmental enquiry and criminal proceedings were based on the same set of facts, charges, evidence and witnesses. The employee had been honourably acquitted in criminal trial during the pendency of the proceedings challenging dismissal. On finding that it amounts to unjust, unfair and oppressive, the Honourable Supreme Court upheld the arguments of the employee. Their Lordships held, on an analysis of the facts, in the following terms:

“ In our opinion, such facts and evidence in the departmental as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would

not be applicable in the instance case. Though the finding recorded in the domestic enquiry was found to be valid by the courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in Paul Anthony case will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed.”

The facts of this case are different as pointed out above. Therefore, the dictum laid down therein will not apply to the facts of this case. Learned counsel for the second respondent in this context, invited my attention to the decision of the Apex Court reported in **Nelson Motis v. Union of India and another** (1992 II C.L.R. 825) to contend for the position that when the nature and scope of criminal cases are different from disciplinary proceedings, an order of acquittal cannot conclude the departmental proceedings. I respectfully follow the same.

8. The next question is about the validity of the findings rendered by the Industrial Tribunal. On a perusal of Ext.P2, it can be seen that the main allegations against the petitioner are in respect of the alleged misappropriation. Ext.R1(1) is the charge sheet wherein 199 instances have been included. The Tribunal was of the view that the standard of proof required in a criminal case and the standard of proof in the proceedings before the Tribunal are entirely different. It is well settled that in a criminal case the offences will have to be established beyond all reasonable doubts

and while in a departmental proceeding and in proceedings before the Tribunal, the onus is one of probability. The allegations in total against the petitioner was that he had misappropriated an amount of Rs.19,819.05 while working as Store Keeper in the Materials Department during the period June 1979 to 29.6.1983 and that he had fraudulently forged and tampered the delivery receipts and the imprest money statements. The relevant findings of the Tribunal are referable to paragraphs 25 to 43. Finally the Tribunal found that the petitioner had misappropriated an amount of Rs.18,647.75. The first relevant aspect to be considered is regarding the entrustment of the money. Mws.2 to 4 have been examined by the management to prove the charges. M.W.2 was the officer in-charge of the receipt stores for a part of the period covered. These witnesses deposed about the procedure which was being followed in the receipt stores for clearance of lorry receipts. M.Ws.3 and 4 in their depositions, gave evidence that while working as Store Keepers in charge of L.R. Clearance, they were physically keeping the imprest money. M.W.2 has also deposed that though legally he was the imprest money holder, factually the petitioner herein was the custodian of the imprest money. For challenging their evidence, the petitioner had produced certified copies of depositions of Mws.2 and 4 given before the criminal court as Exts.W8 to W12 and W14 and W15. The Tribunal found that the same can be used for testing the correctness of the testimonies given before it. It was found after comparing

them that there were no material contradictions. The Tribunal has elaborately compared the evidence of these witnesses for testing the veracity. It was found that there was no material contradictions in their statements and the contradictions, if any, will not be sufficient to discard their evidence. While evaluating the same, this court cannot act as an appellate authority.

9. M.W.3 was the successor of the petitioner in the receipt stores and M.W.4 was a predecessor of him. Learned counsel pointed out that even their evidence is not sufficient to show that his client had directly received cash from the Finance and Accounts Section. The Tribunal referred to the evidence of the petitioner himself to show that he had in fact been receiving cash directly from the Finance and Accounts Sections on several occasions. Those items of evidence have been recorded in paragraph 32 of Ext.P2. Even though learned counsel for the petitioner contended that such evidence cannot be relied upon, in the absence of proof by way of document to show that he was authorised to handle cash like that, the said argument cannot be accepted, in view of the proved facts and evidence. The Tribunal also found that there is evidence to show that the petitioner was actually keeping the imprest money and the officer in charge had checked the imprest money register and had checked the imprest money available. The argument of the petitioner is that the officer in charge alone was keeping the imprest money. The Tribunal rightly negated the said argument on the

finding that if the officer in charge was actually keeping the imprest money, it was not necessary for conducting a surprise check by him.

10. This is a case wherein the petitioner was working under M.W.2 who was the officer in charge. Merely because the duties and responsibilities of an officer like the petitioner will not show that the imprest money was entrusted to him but if actually it was entrusted for administrative convenience, the same is sufficient as far as his liability in the disciplinary proceedings is concerned. On analysis of the oral evidence, the Tribunal clearly found that it was within the competence of M.W.2 to entrust the imprest money with the Store Keeper, herein the petitioner, for administrative convenience. Learned counsel for the petitioner pointed out that this oral evidence ought not to have been accepted in the absence of any documentary evidence. But the question is whether the evidence tendered is trustworthy. The Tribunal found no reasons to disbelieve them and the petitioner could not establish also that the view taken by the Tribunal is so perverse that it cannot be accepted at all.

11. As regards the issue whether the petitioner had actually misappropriated the imprest money also, there was evidence before the Tribunal to the effect that original delivery receipts were in the custody of the petitioner and he was also preparing the cash register and imprest money statements. It was therefore possible for him to tamper the original delivery receipts by inflating the figures. It may be relevant to point out herein that

the petitioner had a case that if the gate passes had actually produced before the Tribunal, it could have been found that he was not involved in taking delivery of the materials. The Tribunal, on an assessment of the evidence, found that it was the petitioner who had made payments and if actually the tampering was done by other employees, it would have been easy for him to detect the same to notice a discrepancy. It cannot be said that it would have escaped his notice of the manipulations, if there were any. Therefore, merely because the gate passes were not produced, it will not absolve the petitioner from the liability. The Tribunal found that even if there is no direct evidence to prove that it was the petitioner who tampered the original delivery receipts, since he was handling the original delivery receipts and imprest money and also was writing cash books and imprest money account statements, it can be reasonably and safely concluded that he himself had tampered the delivery receipts by inflating the figures. For entering such a finding, the Tribunal relied upon the opinion of the handwriting expert as Ext.W3 and the deposition of the handwriting expert before the criminal case which was marked as Ext.W4. Therefore, the evidence that is adduced have clearly established the circumstances leading to the forgery and manipulations. Even though learned counsel for the petitioner submitted that his client is entitled for exoneration in such circumstances, I find that the approach made by the Tribunal is not faulty. It cannot be said that the findings rendered are so perverse. The Tribunal has discussed the several

items of misappropriations in paragraphs 41 and 42 of the judgment to find that the charges of misappropriation have also been proved. It is only after considering these , the conclusions have been arrived at.

12. The powers of this court to interfere on such findings are well settled. Learned counsel for the second respondent rightly points out that this court cannot act as an appellate authority in such matters. In this case, the argument of the learned counsel for the petitioner is that this is a case of no evidence and therefore this court can interfere with the findings of fact. The Tribunal had occasion to consider the testimony of witnesses along with other documents and there is no infirmity in the approach made by the Tribunal also. As held by the Honourable Supreme Court in **Divisional Controller, KSRTC (NWKRTC) v. A.T. Mane** ((2005) 3 SCC 254, once a domestic tribunal, based on evidence, comes to a particular conclusion, it is not open to the courts to substitute their opinion in place of the one arrived at by the domestic tribunal. Therefore, this court may not be justified in substituting the reasons and findings of the tribunal on the basis of the plea raised by the petitioner herein. Such an exercise cannot be done by this court, evidently. Therefor, I find that no interference is called for on the findings of the tribunal that the charges have been proved.

13. The next aspect is regarding the date of effect of the order of the Tribunal. This aspect has been considered by the Tribunal based on the decision of the Supreme Court in **Kalynai v. Air France, Calcutta** (1963

(I) LLJ 679), a decision by the Constitution Bench of the Apex Court. The Tribunal, following the dictum laid down in the above case, did not accept the contention of the petitioner that the doctrine of relation back is not applicable. The claim for back wages from the date of dismissal order issued by the management to the date of the order of the Tribunal was rejected by the Tribunal. Learned counsel for the second respondent relying upon the decision of the Honourable Supreme Court in **R. Thiruvirkolam v. Presiding Officer and another** (AIR 1997 SC 633) contended that the approach made by the Tribunal on the issue of the date of effect of the order of dismissal is perfectly correct. The above decision of the Supreme Court was rendered after considering the authorities on the aspect, viz. **P.H. Kalyani v. M/s. Air France, Calcutta** (AIR 1963 SC 1756), **D.C. Roy v. Presiding Officer, M.P. Industrial Court, Indore** (AIR 1976 SC 1760), **Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoors** (AIR 1980 SC 1896), **Desh Raj Gupta v. Industrial Tribunal IV, U.P. Lucknow** (AIR 1990 SC 2174) and **Rambabu Kheragade v. Maharashtra Road Transport Corporation** (1995 Suppl. (4) SCC 157). After analysing the issue elaborately their Lordships were of the view that going by the decision of the Constitution Bench, the order of punishment is operative from the date on which was made by the employer and not from the date of order of the labour court. Following the above dictum, I find that no interference is called for on the said aspect also.

14. The next aspect argued is about the proportionality of the punishment. The counsel for the second respondent relying upon the decision of the Supreme Court in **Apparel Export Promotion Council v. A.K. Chopra** (AIR 1999 SC 625), contended that the court cannot normally interfere with either the fact findings regarding breach or with penalty or with punishment. It was also pointed out that since the charge relates to misappropriation, the quantum of loss is immaterial and it is the loss of confidence that matters. The decisions of the Honourable Supreme Court in **Regional Manager, Rajasthan State Road Transport Corporation v. Sohan Lal** (2004 (III) LLJ 1078), **Government of A.P. And others v. Mohd. Nasrullah Khan** (2006 (108) FLR 1108), **Divisional Controller, KSRTC (NWKRTC) v. A.T. Mane** ((2005) 3 SCC 254, **Sub Divisional Officer, Konch v. Maharaj Singh** (2003 (III) LLJ 1080) and 1963 (I) LLJ 679 have also been relied upon to support the said argument. In the decision reported in 2003 (III) LLJ 1088 their Lordships held that the jurisdiction of the High Court under Article 226 is a supervisory one and not an appellate one and as such, the court could not be justified in really appreciating the evidence adduced in a disciplinary proceeding to alter the findings of the enquiry authority. In 2005 (3) SCC 254, their Lordships considered the question whether the court will be justified in interfering with the punishment of dismissal when the charge of misappropriation of funds by an employee is proved. It was held in paragraph 12 on the

following terms:

“ Coming to the question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment; on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. In our opinion, when a person is found guilty of misappropriating the corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal.”

In view of the above dictum, I find that since the charges of misappropriation of funds were held to be proved by the Tribunal, the punishment is one which is not liable to be interfered with.

No other point arises. Hence, the original petition fails and the same is dismissed.

(T.R. Ramachandran Nair, Judge.)

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T.R. Ramachandran Nair, J.

O.P.NO. 1203 of 1997-R

JUDGMENT

4th day of July, 2007